IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1757 OF 2002

Ramesh Amarnath Malhotra of Bombay Indian Inhabitant, carrying on business in the trade name and style of M/s. Deonar Development Corporation as the sole proprietor thereof at C/o. Gemini Estate Developers) 12 Eric House, 16th Road, Central Avenue Road, Near Ambedkar Garden, Chembur, Bombay) - 400 071.) ... Appellant (Orig. Plaintiff)

Versus

Anant Narayan Patil (since deceased) through legal heirs)

1. Shri Hitendra Anant Patil)
2. Smt. Ashwini Arvind Tambadkar)
3. Shri Mahendra Anant Patil)
4. Smt. Vanita Anant Patil)

all residing at Patil House, Opp. Metal Box, Sion-Trombay Road, Devnar Village, Mumbai - 400 088.) ... Respondents (Orig. Defendant)

Mr. A.Y. Sakhare, senior counsel with Mr. Shashipal Sankar for the appellant.

Mr. D.D. Madon ib/ M/s. Shirodkar & Co. for the respondents.

CORAM: SMT. RANJANA DESAI, J.

DATED: 1ST MARCH, 2005.

ORAL JUDGMENT:-

1. In this first appeal, the appellant (for convenience, "the plaintiff") has challenged the judgment and decree dated 15/6/2002 passed by the City Civil Court at Bombay in S.C. Suit No.2435 of 1990 whereby his suit was dismissed.

2. The facts of the case may be briefly stated. The plaintiff claims to be a builder and developer dealing in the name and style of M/s. Deonar Development Corporation as a sole proprietor thereof. The defendant is the owner of the property detailed in the plaint. The plaintiff claims that a total area of 5636 sq. mtrs. was entrusted to him under an agreement dated 13/2/1980 (for convenience, "the said agreement") for development of the excess vacant land by the defendant. According to the plaintiff, through inadvertence or oversight, the firm of the plaintiff was described as a partnership firm and the plaintiff as a partner thereof. At no point of time, the plaintiff was a partner. He has always been the proprietor of the said firm. According to him, he continued to be the proprietor of the said firm even at the time of institution of the suit and he has paid an amount aggregating to Rs.32,500/- from time to time to the defendant. On 6/9/1983 and 23/12/1983, letters were issued by the defendant to the plaintiff whereby the time was further extended to enable the plaintiff to take the permission from the competent authority under the Urban Land Ceiling Act for the purposes of the development of the suit property. It is the case of the plaintiff that by the said letters, the defendant gave an irrevocable power of attorney to the plaintiff and appointed the plaintiff as his authorised attorney to enter into correspondence in order to get no objection certificate from the ULC authorities, Bombay Municipal Corporation (for short, "BMC") and such other governmental

authorities. The plaintiff appointed his architect.

3. The further case of the plaintiff is that under the said agreement, the defendant was required to make out a clear and marketable title to the suit property within three months of its execution. However, the defendant did not do so. Sometime towards the end of 1988, the defendant informed the plaintiff that some litigation was pending in respect of the ownership of the suit property. In Appeal No.272 of 1982 pertaining to the suit property, consent terms were filed on 8/10/1986 between the defendant and one Kotiram Patil whereby the defendant gave up and relinquished his right, title and interest in respect of part of the premises. The plaintiff contends that on 22/11/1989, the plaintiff came across a press advertisement purported to have been inserted on behalf of M/s. Adhiraj Construction Co. stating, inter alia, that the defendant had entered into an agreement with them for the purpose of selling the suit property. It is on the apprehension that the defendant may have entered into an agreement with M/s. Adhiraj Construction Co. or with some third party and/or transferred the possession of the suit property so as to frustrate the said agreement that the plaintiff filed the instant suit praying for perpetual injunction restraining the defendant from alienating and/or disposing of the suit property.

4. The defendant resisted the suit. The defendant contended that on or about 11/1/1990, he had entered into

an agreement in respect of the suit property with A.N. Kamble and A.S. Sonawane, the Chief Promoters of Saikripa Co-operative Housing Society Limited (Proposed) for valuable consideration. According to him, the said agreement was only a collateral security for the sum advanced by the plaintiff to the defendant and the said loan not having been recovered by the plaintiff has since become time barred. The defendant further pleaded that the defendant did not receive any response to the press advertisement and, therefore, the defendant went ahead and completed the transaction with the purchaser. According to the defendant, the plaintiff did not perform his part of the contract where time was the essence. According to the defendant, the said agreement was cancelled both orally as well as in writing in November, 1983. The defendant claimed that the possession of the suit property was parted with on or about 6/11/1989. The defendant contended that he has also executed an irrevocable power of attorney in favour of the purchaser to perform the necessary acts in that behalf. The defendant expressed his readiness to return the amount allegedly paid to him by the plaintiff. According to him the price offered by the present purchaser was better. The defendant contended that the plaintiff's firm was unregistered and, therefore, the suit was hit by section 69 of the Indian Partnership Act. The defendant denied that he has received Rs.32,500/- as set out in the plaint.

5. In support of its case, the plaintiff examined

himself on oath. The defendant, however, did not lead any oral evidence. The trial court by the impugned judgment dismissed the suit holding that the defendant had failed to prove that the suit is barred by limitation. It was held that the defendant had proved that the instant suit simplicitor for injunction without substantive relief is not maintainable. The trial court held that the plaintiff failed to prove that the agreement dated 13/2/1980 was entered into by the plaintiff in his capacity as proprietor of M/s. Deonar Development Corporation. The trial court further held that the defendant had proved that the suit is not maintainable for want of registration under section 69 of the Indian Partnership Act. It was further held that the plaintiff had failed to prove that the agreement dated 13/2/1980 was valid, subsisting and enforceable. It was further held that the defendant had failed to prove that the said agreement was terminated in November, 1983 and that the said agreement was executed only as a collateral security for the money advanced by the plaintiff to the defendant. The trial court further held that the plaintiff had proved that he had paid total amount of Rs.32,500/- to the defendant in pursuance of the said agreement. In view of the above findings, the trial court dismissed the suit.

6. Before I deal with the rival contentions, it is necessary to mention one aspect of this appeal on which the learned counsel for the parties are agreed. Issue No.5 framed by the trial court reads as follows. "Does

the plaintiff prove that the agreement dated 13/2/1980 is valid, subsisting and enforceable?" This issue is answered by the trial court in the negative. However, in the entire judgment, there is no discussion on this aspect. The trial court has not given any reasons as to why it has recorded such a finding.

7. Mr. Sakhare, the learned counsel appearing for the appellant urged that it is, therefore, necessary for this court to direct the trial court to give its reasons on this issue. The grievance of Mr. Sakhare appears to me to be justified because in the absence of reasons, the plaintiff cannot effectively deal with this point which is held against him. Mr. Madon, the learned counsel for the respondent submitted that the determination of this issue is not necessary for the purpose of determination of the other issues involved in the instant suit and, therefore, by consent of the parties the said issue be deleted. He contended that in view of the fact that the trial court had not given reasons, the defendant accepts that the decision on the said issue shall not act as a resjudicata between the plaintiff and the defendant in other proceedings. To that effect, the learned counsel for the plaintiff and the defendant have filed a pursis. The said pursis dated 11/2/2005 is marked as ‘X’.

8. In view of the said pursis, I delete issue No.5 by consent of the parties. The decision on that issue shall not act as resjudicata between the parties to this appeal in other proceedings, if any.

9. Mr. Sakhare, the learned counsel for the plaintiff contended that the trial court has non-suited the plaintiff basically on two grounds. Firstly, it is held that the plaintiff's suit is not maintainable for want of registration of the plaintiff's firm. It is hit by section 69 of the Indian Partnership Act. Secondly, it is held that the suit simplicitor for injunction without substantive relief is not maintainable in view of section 41(h) of the Specific Relief Act. Mr. Sakhare contended that the trial court has misread the evidence on record and misconstrued the provisions of law.

10. Mr. Sakhare pointed out that the plaintiff's Notice of Motion No.1746 of 1990 for interim relief was heard on 31/3/1990. On that day, the plaintiff's advocate sought leave under Order II, Rule 2 of the Civil Procedure Code (for short, "the Code") for instituting suit for specific performance. However, the learned trial judge refused to grant leave on the ground that the plaintiff is not entitled to claim specific performance because the ULC permission which is a pre-requisite for conveyance has not been granted. Drawing my attention to section 41(h) of the Specific Relief Act, the learned counsel contended that the injunction can be refused only when effective relief can certainly be obtained by any other usual mode of proceedings. He submitted that as the ULC permission was not available, the conveyance could not have been executed and the learned judge having refused permission under Order II, Rule 2 of the Code, the plaintiff cannot

be faulted for having not filed a suit for specific performance.

11. Mr. Sakhare, then contended that it is only when the plaintiff came across a public notice issued by the advocate for M/s. Adhiraj Construction Co. in the Sunday Free Press Journal on 22/11/1989 in which it was stated that the defendant had agreed to sell the suit property for development to M/s. Adhiraj Construction Co. that the plaintiff apprehended that the defendant was trying to do away with the suit property. The apprehension became a threat when on 28/3/1990 several persons posing themselves as agents of said M/s. Adhiraj Construction Co. visited the suit property and started taking measurement. The plaintiff had no other alternative but to rush to the court and file a suit for injunction. In the plaint, the plaintiff made it clear that in view of the fact that necessary sanction / no objection certificate / permission has not been issued by the Government of Maharashtra, the transaction could not be completed and, therefore, the plaintiff cannot at the moment ask for specific performance of the said agreement. In the plaint, the plaintiff had prayed for leave under Order II, Rule 2 of the Code which was subsequently rejected. Mr. Sakhare further pointed out that the trial court by its order dated 15/6/2002 held that the agreement dated 13/2/1980 is not valid. Therefore, in any case from 15/6/2002, the plaintiff could not have filed the suit for specific performance of the agreement. The trial court was, therefore, wrong in

holding that the plaintiff is not entitled to relief of injunction as he had filed a suit simplicitor for injunction without substantive reliefs. The trial court erred in holding that the suit is not maintainable.

12. As regards the second point which pertains to maintainability of the suit on the ground of non-registration of the partnership firm, Mr. Sakhare contended that the plaintiff is the sole proprietor of M/s. Deonar Development Corporation. M/s. Deonar Development Corporation is not a partnership firm and, therefore, the bar created by section 69 of the Indian Partnership Act would not affect the plaintiff's suit. He contended that in the plaint, the plaintiff has clearly stated that the plaintiff carries on business as a builder and developer in the trade name and style of M/s. Deonar Development Corporation as a sole proprietor thereof. It is further stated that though inadvertently or through oversight or due to a mistake the plaintiff's sole proprietary firm was described as a partnership firm and the plaintiff as a partner therein, at no point of time, the plaintiff's sole proprietary firm was a partnership firm nor did the plaintiff ever carry on business as a partner of the said firm and, therefore, the said agreement was, in fact, and in substance, with the plaintiff as the sole proprietor of the said firm of M/s. Deonar Development Corporation. Mr. Sakhare drew my attention to the evidence of the plaintiff. In his evidence, the plaintiff has stated that his brother Kisan Malhotra was interested in the transaction. He had also

signed the said agreement. However, his brother later developed cold feet and backed out. Therefore, the word "partnership" was found on the said agreement. However, it was never a partnership firm as such. The learned counsel contended that most of the exhibited documents (Ex-58, Ex-59, Ex-60, Ex-65 and Ex-68) indicate that the plaintiff's firm is a sole proprietary firm. Mr. Sakhare contended that the trial court ignored the averments made in the plaint and the evidence and wrongly came to the conclusion that the suit was hit by section 69 of the Indian Partnership Act. Mr. Sakhare further contended that the defendant has not even stepped in the witness box. In such circumstances, it was wrong on the part of the trial court to dismiss the plaintiff's suit.

13. As against this, Mr. Madon, the learned counsel for the respondents drew my attention to the said agreement where it is stated that the developer shall within six months of execution, through his own efforts at his own costs, obtain the sanction of the appropriate authority for development of the vacant land. He submitted that the plaintiff cannot, therefore, blame the defendant because the performance of the contract was not possible. It is his inaction which has led to this. Mr. Madon submitted that in any event, the plaintiff could have filed a suit for a conditional decree for specific performance subject to ULC permission being obtained. The plaintiff has not done so. In this connection, he relied on the Full Bench judgment of the Gujarat High Court in **Shah Jitendra Nanalal, Ahmedabad v. Patel**

Lallubhai Ishverbhai, Ahmedabad and others, AIR 1984 Guj. 145. Mr. Madon also contended that the plaintiff has not challenged the order passed by the trial court refusing leave under Order II, Rule 2 of the Code. The learned counsel also relied on the judgments in **The Municipal Corporation of Delhi v. Suresh Chandra Jaipuria and another, AIR 1976 SC 2621, M/s. Jawahar Theatres Private Limited v. Smt. Kasturi Bai and another, AIR 1961 MP 102, Satish Bahadur v. Hans Raj and others, AIR 1980 Punjab and Haryana 351 and Rajendra Kumar v. Mahendra Kumar Mittal and others, AIR 1992 Allahabad 35,** in support of his submissions.

14. As regards the contention that the plaintiff's firm is a sole proprietary firm and that the suit is not hit by the bar created by section 69 of the Indian Partnership Act, the learned counsel contended that this case of the plaintiff is dishonest. He submitted that the said agreement and the evidence of the plaintiff make it amply clear that M/s. Deonar Development Corporation is a partnership firm and since it is not a registered partnership firm, the instant suit is not tenable. He submitted that the trial court has rightly held so. In this connection, he relied on the judgment of the Supreme Court in **Loonkaran Sethia etc. v. Mr. Ivan E. John and others, AIR 1997 SC 336**. Mr. Madon summed up by saying that there is no infirmity in the trial court's judgment calling for interference by this court.

15. In order to appreciate the contentions of Mr.

Sakhare that the plaintiff was the sole proprietor of M/s. Deonar Development Corporation, it is necessary to first have a look at the pleadings. Paragraph 4 of the plaint reads as under:

> "4. The Plaintiff says that through inadvertence and/or oversight and due to a mistake, the Plaintiff's sole proprietary firm was described as a Partnership firm and the Plaintiff as a partner therein. The Plaintiff says that at no point of time was the Plaintiff's sole proprietary firm a partnership firm nor did the Plaintiff ever carry on business as a partner of the said firm. The Plaintiff always was and still continues to be the sole proprietor of the said firm. In the circumstances the said Agreement dated 13th February 1980 was in fact and in substance with the Plaintiff as the sole proprietor of the said firm of M/s. Deonar Development Corporation."

16. This assertion made by the plaintiff, however, does not appear to be true. In the first paragraph of the said agreement, M/s. Deonar Development Corporation is described as a partnership firm, carrying on business of Builders, Contractors and Developers. It is further stated that the said firm is hereinafter called 'the Developers' (which expression shall unless it be repugnant to the context or meaning thereof mean and

include the partners or partner for the time being of the said firm.) My attention was drawn to the original of the said agreement. It is significant to note that the said agreement is signed by the plaintiff and one other person as partners of M/s. Deonar Development Corporation. It is also significant to note that on the confirmation letter dated 12/8/1980, the plaintiff has signed as a partner of M/s. Deonar Development Corporation. In spite of this, in his evidence, the plaintiff has come out with a case that there was no partnership firm. He has stated that his brother was also interested in the transaction. He had also signed the said agreement. However, his brother later developed cold feet and backed out. Therefore, the word "partnership" was found on the said agreement. However, it was never a partnership firm. This story is obviously put up to get over the above mentioned recitals in the said agreement and the signatures on the said agreement and the letter of confirmation by the plaintiff as a partner. I have no doubt that the plaintiff has come out with a false case that M/s. Deonar Development Corporation is a sole proprietary firm. The trial court is right in coming to the conclusion that it is a partnership firm. Once it is held that it is a partnership firm and it is not registered, the plaintiff could not have filed the instant suit as the bar created by section 69 of the Indian Partnership Act would come into play.

17. Reliance placed on the judgment of **Loonkaran Sethia's case (supra)** is apt. In that case, the

plaintiff had sued for a specific and ascertained sum of money on the basis of the settled account. According to the plaintiff, his partnership firm was dissolved with effect from 30/6/1948 and, thereafter, he alone carried out the dealings with the defendant as a sole proprietor of his firm. His case was that the agreement dated 6/7/1948 was entered into by him with the defendant as a sole proprietor of Sathiya & Co. According to the defendant, it was a partnership firm and was in existence on 6/7/1948 and, thereafter, as well. The Supreme Court observed that a close scrutiny of the documents and other evidence clearly negative the contention of the plaintiff and support the assertion of the defendant. The Supreme Court observed that a bare glance of section 69 of the Indian Partnership Act is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm whether existing or dissolved, void. It was further observed that a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of section 69 of the Partnership Act. On the facts before it, the Supreme Court observed that the suit was undoubtedly, a suit for the benefit and in the interest of the firm and consequently a suit on behalf of the firm. Thus, the suit was clearly hit by section 69 of the Partnership Act and was not maintainable. In view of this authoritative pronouncement of the Supreme Court, which would clearly

be applicable to the present case, in my opinion, the trial court is right in holding that the plaintiff's suit was not maintainable on account of the bar created by section 69 of the Partnership Act.

18. So far as the submission based on section 41(h) of the Specific Relief Act is concerned, I feel that the trial court has rightly rejected that as well. The plaintiff has filed the suit for injunction simplicitor. He did not file a suit for specific performance of the said agreement. It is well settled that when equally efficacious relief is obtainable in any other usual mode or proceeding, an injunction which is a discretionary relief cannot be granted. This is the mandate of section 4(h) of the Specific Relief Act. This has been reiterated by the Supreme Court in **Municipal Corporation of Delhi's case (supra)** on which Mr. Madon has relied upon. Several other judgments are cited by Mr. Madon on this point but in my opinion, this principle is so well settled that it is not necessary to refer to them because all the judgments restate the same principle.

19. Mr. Sakhare, however, pointed out that a prayer was made before the learned judge that leave may be granted under Order II, Rule 2 of the Code and the said prayer was rejected on the ground that the ULC permission was not obtained and, therefore, the said agreement could not have been specifically enforced and, hence, the plaintiff could not file a suit for specific performance. It is not possible to accept this explanation. First of all,

under the said agreement, the responsibility of obtaining all the necessary permissions was on the plaintiff. The plaintiff took no timely steps in that behalf. The order refusing leave under Order II, Rule 2 of the Code passed by the trial court was not challenged by the plaintiff.

20. Nothing prevented the plaintiff from seeking a conditional decree. In this connection, it will be useful to refer to the Full Bench judgment of the Gujarat High Court in **Shah Jitendra Nanalal's case (supra)**. In that case, defendants 3, 4 and 5 had entered into an agreement with defendants 1 and 2 to sell certain land. Agreement was executed on 4/7/1966. Thereafter, defendants 1 and 2 entered into an agreement with the plaintiff on 1/7/1967 to sell a portion of the said land. Subsequently, there appears to have been a suit for specific performance as between defendants 1 and 2 on one hand and defendants 3 to 5 on the other. Pending this suit, the plaintiff filed Civil Suit No.1915 of 1970 for specific performance of the agreement. The suit filed by defendants 1 and 2 was compromised but the plaintiff was not a party to that compromise. In the plaintiff's suit, the plaintiff was non suited in so far as specific performance was concerned. Against that, the plaintiff had come up in appeal. Subsequent to the institution of the suit, the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972 came into force and later on in its place the Urban Land (Ceiling and Regulation) Act, 1976 (for short, "the ULCR Act") came into force. Section 5 of sub-section 3 of the ULCR Act,

stated that any transfer made in contravention of the said provision shall be null and void. The question before the Supreme Court was whether a decree for specific performance could be granted in a case where the suit was pending on the date of the commencement of the Act. The Supreme Court observed that so long as the provision declaring the transfer under section 5(3) as void is subject to the right to move for exemption, obtain exemption and transfer the property, the power of an owner of vacant land in excess of the ceiling limit to 'alienate' such land is dormant in him and such power could be exercised by him in case he seeks exemption, satisfies the Government that the grounds for exemption exist and obtains such exemption. The Supreme Court observed that therefore, the decree for specific performance cannot be defeated on the ground that 'transfer' inter partes would not be possible. The possibility of obtaining exemption survives. That being the situation, until then, a plaintiff seeking specific performance cannot be told that the terms of the contract cannot be fulfilled. It was further observed that once it is said so, the plaintiff loses his right to get a decree for specific performance, though, invoking the provisions of the very Act, based on which the plaintiff was told that he could not get conveyance of the property agreed to be sold to him, the owner of excess land obtained exemption and continues in possession of the property and perhaps even alienates it later. The Supreme Court observed that there was no reason either in law or in logic to countenance such a situation and there

was nothing prohibiting a decree being passed for specific performance, with, of course, such alternative remedies as may be called for in a situation where that decree may become inoperative. The decree for specific performance may be made conditional on the exemption under section 20(1)(a) or (b) operating. I am of the opinion that similarly, the plaintiff could have prayed for a decree of specific performance of the said agreement conditional on the availability of ULC permission. The plaintiff has not done so. He was, therefore, rightly non-suited on this ground.

21. In the result, in my opinion, the plaintiff has made out no case for setting aside the impugned judgment and decree. The appeal is, therefore, dismissed.

22. At this stage, the learned counsel for the appellant states that the order be stayed for a period of eight weeks. The learned counsel for the respondent opposes. In the circumstances, the order dated 9/9/2002 passed by Justice P.V. Kakade to continue for another period of four weeks.

23. In view of the above, the connected civil application is also disposed of.

(SMT. RANJANA DESAI, J.)